No. 9956

United States
Circuit Court of Appeals
For the Ninth Circuit

REGIONAL AGRICULTURAL CREDIT CORPORATION OF SPOKANE, WASHINGTON, a corporation,

Appellant,

vs.

E. B. CHAPMAN, as Administrator of the Estate of Simon T. Douglas, Deceased,

Appellee.

Brief of Appellee

On Appeal from the District Court of the United States
For the District of Montana,
Great Falls Division
Honorable Charles N. Pray, Judge.

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OPINION BELOW

The opinion of the District Court (R. 290-301) is reported in 38 F. Supp. 604. This is an appeal from a judgment entered March 5, 1941, (R. 308-309).

JURISDICTION

The jurisdiction of the District Court was exercised pursuant to Sec. 42, Title 28 U.S.C.A.

Chap. 229, Sec. 12, Act of February 13, 1925, 43 Stat. at Large 941, which establishes jurisdiction in actions against a corporation incorporated by or under an act of Congress. A notice of appeal was filed in said cause September 17, 1941 (R. 328).

STATEMENT OF THE CASE

The ultimate questions to be decided can best be viewed from appellee's standpoint by a brief restatement of the case.

The action was instituted in the District Court of the Tenth District of Montana for the recovery of the damage occasioned the Estate of Simon Douglas by a summary foreclosure of a chattel mortgage in violation of a section of the Montana Code, 10140, prescribing damages in double the value of the property alienated, where alienation took place after death and before the appointment of an administrator. (R. 3 to 13.)

On petition, the cause was removed to the Federal District Court. (R. 27.)

The complaint was then amended (R. 73-75). The amended complaint was a simplification of the original and claimed property of the value of $31,500.20 had been alienated by appellant in violation of said Sec. 10140. Plainttiff asked damages for double that sum (R. 75). Appellant then filed an answer and cross-complaint setting up: (R. 78)

(a) That defendant (appellant) was a government owned corporation;

(b) That Douglas, then deceased, had executed a chattel mortgage December 27, 1933, to

defendant securing a note for $17,000.00. (R. 80);

(c) That the note, not being paid at maturity, and Douglas having died January 12, 1935, after having executed a renewal mortgage, which appellant had filed of record;

(d)That no person was appointed administrator until April 9, 1935;

(e) That on January 12, 1935, Douglas was indebted to plaintiff in the sum of $16,328.48;

(f) That for the purpose of protecting its security "as well as the interests of said Estate of Simon Douglas," and pursuant to a power of sale contained in the chattel mortgage, appellant noticed a sale of the property for February 5, 1935;

(g) The property was sold and the net proceeds, $14,694.28, was applied on the debt, leaving a balance of $1,694.64, for which a claim has been presented to the administrator of Douglas' estate. (R. 78-90.)

To the answer an amended reply was filed: (R. 99 to 115)

Succinctly the issues made by the pleadings are:

(a) Did the fact that appellant's mortgage contained a power of sale alter its liability to respond in damages as provided by Sec. 10140 R. C. Mont. 1935?

(b) The value of the property sold.

An issue not made by the pleadings is now debated by appellant, viz: If appellant must pay damages, can it be held to pay double damages?

At the trial, which followed, evidence was in-

troduced that the value of the property amounted to from $18,500.00 to $22,000.00. Comment on these amounts will be made at appropriate places in this brief.

CONDITION OF THE RECORD

There are many inaccuracies in appellant's statement of facts throughout its brief but we shall only mention a few of them at this juncture.

The court will find the record herein a most peculiar one. In appellant's designation of portions of the record to be included, we find the requirement that certain superseded pleadings and trial briefs be included. (R. 58, R. 67, R. 320, R. 3, R. 31, R. 36.)

The inclusion of these was objected to. (R. 339.)

Their inclusion in the record could not be prevented.

No comment thereon is to be found in appellant's brief. Perhaps they were included so as to give color to the claim that the court changed its mind as to the law of the case after sustaining a demurrer to the original complaint (R. 35), and before the case was tried. To what end or purpose such claim is made appellee is at a loss to know. Possibly that is the reason for the inclusion of superseded pleadings. (R. 3).

18 Stan. Encyc. Proc. 808,

states the general rule as follows:

> "The doctrine of the law of the case, in its strict sense, does not apply to decisions or rulings of the trial court. It has the power

to change its prior rulings in the same case at any time during the progress of the cause, and as a general rule should do so as a matter of discretion, whenever it becomes convinced that an erroneous ruling has been made."

Post v. Pearson
106 U. S. 418
27 L. Ed. 774.

The statement in black type that "The District Court originally held that the Montana Penalty Statute was not applicable to this case," and the statements immediately following have no foundation in the record. (Appellant's Brief pp. 4-5.) We know of no such holding or comment, nor any such characterization of the statute by the Court.

QUESTIONS FOR DETERMINATION

The questions for determination by this court are as follows:

(1) Did the power of sale survive the death of the mortgagor? If so, was not the right to exercise the power of sale suspended?

(2) The Montana multiple damage statute does apply regardless of fraud, bad motive or wrongful intention; all of which however were present.

(3) The court proceeded correctly and in accordance with the authorities, doubling the value of the property as determined by the court, and deducting therefrom, the indebtedness represented by the note and chattel mortgage.

(4) The next point raised by appellant's brief is that the Montana statute does not apply to the corporation defendant, the appellant here. The question of sovereign immunity is not presented in this case.

We shall take up the argument of the case in the order in which it is presented in appellant's brief.

ARGUMENT

I.

IT IS WHOLLY IMMATERIAL WHETHER THE POWER OF SALE IN THE CHATTEL MORTGAGE WAS COUPLED WITH AN INTEREST OR SURVIVED THE DEATH OF SIMON DOUGLAS. IF IT DID SURVIVE DOUGLAS' DEATH ITS EXERCISE WAS SUSPENDED BY THE PROVISIONS OF SECTION 10140 R. C. 1935.

At the outset of the argument of appellant it is urged that Muth v. Goddard, 28 Mont. 237, 72 Pac. 621, is of controlling force. That Muth v. Goddard has no bearing whatsoever in this case can be easily demonstrated.

DOES A POWER OF SALE CONTAINED IN A CHATTEL MORTGAGE SURVIVE THE DEATH OF THE MORTGAGOR?

The great weight of authority, and substantially all **authority holds that a power of sale, where title has not been vested by an instrument or trust,** does not survive death.

Gardner v. Billings First National Bank, 10 Mont. 149, 25 Pac. 29, 10 L. R. A. 45; Hunt

v. Rousmanier's Admr. 8 Wheat. (U. S.) 174, 5 L. Ed. 589; Parke v. Frank, 75 Cal. 364, 17 Pac. 424; Prink v. Roe, 6 Cal. Unrep. Cas. 491, 7 Pac. 481, 70 Cal. 296, 11 Pac. 820; Travers v. Crane, 15 Cal. 12; Turman v. Winecoff, 138 Ga. 728, 75 S. E. 1131; Terwilliger v. Ontario etc. R. Co., 149 N. Y. 86, 43 N. E. 432; Farmers L. & T. Co. v. Wilson, 139 N. Y. 284, 34 N. E. 784, 37 Am. St. Rep. 696; Hoffman v. Union Dime Savings Institute, 109 App. Div. 24, 95 N. Y. S. 1045; Fisher v. Southern L. & T. Co., 138 N. Car. 90, 50 S. E. 392; 2 C. J. S. 1176.

We will presently analyze those cases indicating that such power is not revoked by death; but we must reiterate at this point that such rule is over-shadowed by Section 10140, R. C. 1935, which suspends its exercise. **The right to exercise the power of sale was by the cited statute suspended during the period intermediate the death of Douglas and the appointment of an administrator.** In the larger sense, it will serve no purpose to investigate the true rule with respect to **the survival** of such a power of sale when found in a chattel mortgage. For instance the rule laid down in

Muth v. Goddard, 28 Mont. 237,
72 Pac. 621

has no application here. There it appears that there was a power granted in a **trust deed which had passed the legal title to the trustee,** which takes the case out of the general rule supra. It will be noted, however, that the power in the Muth case was not exercised intermediate the death and appointment of a legal rep-

resentative of the estate. Since the facts involved **no personal property,** the foreclosure was in no sense prohibited by the statute. There was no attempt in the chattel mortgage in question (R. 163-172), to pass the legal title to the property. The power of sale contained in the chattel mortgage in the case at bar was distinctly different than in the Muth case. Whether or not the Montana Supreme Court held that, in a case of that character, involving real estate, the power of sale survived the death of the mortgagor is academic and of no consequence. It did not then and never has so held in the case of a chattel mortgage.

The ejectment case of

First National Bank v. Bell,
S. & Om. Co.,
8 Mont. 32, 19 Pac. 403,

did not involve the death of the mortgagor. The only question considered by the Court was whether a power of sale could be validly exercised or whether, regardless of its being contained in a mortgage, a suit in equity for foreclosure **was not the only method whereby a mortgage could be legally foreclosed.**

We think this analysis of the Montana cases will obviate any further answer to the invocation of the disputed rule of survival of the power of sale. Here, however, we have a statute which so far as called into play in this case, forbids the **alienation of personal property only.** Whatever rules may obtain as to real estate, personal property stands on a distinct footing. Real estate cannot be made away with.

It will stand in somebody's name on the record. The record will also have to carry evidence showing how the person in whose name it stands came into claimed ownership. Real estate cannot be embezzled or stolen. Personal property cannot readily be followed, is capable of concealment, loss and dissipation, and so the statute makes no prohibition against dealings with real property and is expressly aimed at alienations of personality so far as the facts here are concerned.

The Court in the Muth case limits the rules to cases where **legal title is vested.** It does also say "The law may suspend its own process."

There is in Montana a code provision that a mortgage is a mere lien upon the property. (Sec. 8246 R. C. Mont. 1935.) Trust deeds rest on a different footing. There title passes. A power of sale in conjunction with a mere lien does not survive death.

The Montana statute has left open, to be controlled by general provisions, such as 7975 R. C. Mont. 1935, the question of when a power survives death, for a power of sale is merely authorized by statute. Of course, it cannot survive death where as here the language of the instrument **is not** "do hereby sell and transfer" or some similar expression, instead of "the mortgagor mortgages to the mortgagee," as in the instrument in question (R. 163). We can now clearly see the distinction between Muth v. Goddard, involving a trust deed, and the case at bar.

The learned Judge below, familiar with Montana law, was not misled by Muth v. Goddard

and held that even though the power did survive death, it was suspended until the appointment of an administrator. Learned counsel seem to have gotten themselves into a frame of mind where they feel justified in contending that the Montana Legislature expressly passed Sec. 10140, to interfere with the security in this particular case, **not of the United States as intimated,** but of a government owned corporation in fact. This statute has been on the books since 1877. It is first found as Sec. 129, p. 270, Laws 1877; Sec. 192-2nd Div. Stat. 1879-1887; Sec. 2570 Codes Civ. Proc. 1895; Sec. 7504, Rev. Codes 1907; Sec. 10170 Rev. Codes 1921.

When the Chattel mortgage was executed on the 27th day of December 1933 (R. 163) the law had been on the Montana statute books 56 years.

The law is part of every contract.

Snider v. Yarbrough,
43 Mont. 203,
115 Pac. 411.

This is not the first instance in the books when, if the power of sale did survive the death, it was **suspended** by death.

Loss. v. Sternberg, 50 Mo. 124;
Wiener v. Zweib, 105 Tex. 262;
141 S. W. 771, 147 S. W. 867.

It is almost amusing to find learned counsel insisting in effect that the "tail should wag the dog" by making the unwarranted contention that the court **"should have held that the voluntary act of the mortgagor in granting the power of sale suspended the penalty statute!"**

We pass without further comment at this time, the provisions of Sec. 8257 R. C. Mont. 1935, and its application by

Kinsman v. Stanhope,
50 Mont. 41,
144 Pac. 1083,

to Chattel mortgages; cited by counsel pp. 17 and 18 of their brief.

Likewise we postpone an argument with regard to the doctrine of

U. S. v. Summerlin, 310 U. S. 414,
84 L.Ed. 1283; and Davis, Director
General v. Corona Coal Co., 265 U. S.
219, 68 L.Ed. 987,

which cases fall into a differentiated class discussed in Div. V hereof. We only, at this juncture, express surprise at the failure of learned counsel for appellant to distinguish between immunity of sovereign authority and that of general liability of government owned corporations. We shall go into that subject when we discuss the distinction between acts of the government itself and acts of corporations set up by the government, which do not exercise sovereignty, all as appears in the above and related cases.

II.

SECTION 10140 R. C. MONT. 1935 IS NOT A PENAL STATUTE

ARGUMENT

The parent statute, adopted by Montana and Oklahoma from California, as will be hereafter discussed, with the construction thereof al-

ready established by the California Court in

Jahns v. Nolting,
29 Cal. 507,

is conclusive on the subject. From that case we quote as follows:

"A penal statute is one that imposes a penalty, or creates a forfeiture as the punishment for the neglect of some duty, or the commission of some wrong, that concerns the good of the public, and is commanded or prohibited by law. The law, generally, first prescribes what shall or shall not be done, and then declares the penalty. Its primary object is punishment, and to deter others from offending in like manner, though it may give the penalty, or some portion of it, to the person who may prosecute the action. (Reed v. Northfield, 13 Pick. 94; the Suffolk Bank v. the Worcester Bank, 5 Pick. 106; Frohock v. Pattee, 38 Maine 103; Bayard v. Smith, 17 Wend. 88; Sedg. Stat. and Const. Law, 390.)

"In this case, the public are not more interested than they are in every action for a tort prosecuted for the benefit of a private party, nor do the damages authorized by the statute partake of the nature of the punishment for an offense, in a greater degree than in every case where by the common law or the statute a recovery beyond the actual injury sustained is permitted."

This is the universal rule.

Dunbar v. Jones,
87 A. 787
87 Conn. 253.

Dubreuil v. Waterman,
78 A. 721,
84 Conn. 47.

WHAT IS THE MEANING OF THE WORD "ALIENATE" FOUND IN OUR STATUTE?

The word "alienate," itself, as contained in the statute is directed at every person. No thief or interloper meddling with the property would fall under the classification connoted by the word "alienate." In

2 C. J. 1934,

the various definitions of the word "alienate" are set forth as follows:

> "To convey or transfer to another; to convey or transfer to another the title to property; to transfer the property ownership of anything, to make over to another owner; to pass property from one person to another; to transfer property from one's self to another; to transfer property to another; to make a thing another man's; to divest one's self of property or title, at common law to voluntarily part with the ownership of property either by bargain and sale, or by some conveyance or by gift or will."

See also 3 C. J. S. 515.

In Bancroft's Probate Practice, Vol. 2, p. 891, it is said:

> "Under code sections authorizing double damages where one, prior to appointment of

a representative, "alienates" or "embezzles" property of the decedent, to "embezzle" is to appropriate fraudulently to one's own use, or to conceal the effects of the estate which such person has in his possession; and to "alienate" signifies wrongfully to transfer the property to another. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law. The statute does not give a new right of action, nor does it create a remedy which did not previously exist; it merely increases the measure of damages in case the tortious conversion has been committed at a particular time when the property was peculiarly exposed to loss—that is, the time intermediate the death of the deceased and the issuing of letters of administration. * * * The double-damage statutes have been held applicable to one who forecloses a chattel mortgage between the time of death of the decedent and the appointment of a representative. They do not, however, prevent such mortgagee from replevying the property prior to issuance of letters. And if a chattel mortgagee, before the appointment of an administrator or executor, merely takes possession of the mortgaged property, without selling it, he is not liable for double damages under the "embezzlement" or "alienation" statute, and it is immaterial that he may have unsuccessfully offered to sell the property during such time."

It was intended by the code provision in question to differentiate between **crime** and **acts which did not constitute crime.** It was directed against everyone then having some character of title, **those acting under power of sale and all others.** It excepts no one whose act amounts to "alienation" within the legal definition of that word. It does not except persons acting in good faith or alleged good faith. It makes the bald declaration that **anyone** so interfering with the rights of creditors and the rights of heirs **shall pay double the value of the property so alienated.**

Here, however, there can be no doubt that the damage was incurred to the tune of the value of the property alienated in the sum of $17,000.00, if only the single value be considered. The statute invoked, declares this must be doubled.

Under the statute, the liability for double the damage exists, regardless of what the property may have been sold for by the one alienating it. **Admittedly here, the appellant alienated the property for a total of $15,002.10.** Defendant has committed itself to this value at least. The damage, in this case, depending upon the lower Court's appraisal of the evidence, as to true values, and which the Court fixed in accordance with the statute, or $34,000.00, would have to lie somewhere between $30,004.20, double the value claimed by defendant, and $44,000.00, double the value as fixed by some of appellee's evidence, and from that there is no escape under the authorities. In Oklahoma the

same identical statute exists as here. It appears as

Section 1220, Com. Stat. of Okla. for the year 1921, or 1603 Wilson's Rev. & Ann. St. Okla. 1903,

reading word for word with the Montana statute, as quoted in the following case of

Litz Exchange Bank of Alva, Okla,
15 Okla 564,
83 Pac. 790,

wherein the Court said:

"The question presented to this Court is whether or not the holder of a chattel mortgage, **who in good faith deems himself insecure,** after the death of the mortgagor, **who dies intestate, before the debt is due,** and prior to the appointment of an Administrator, either special or general, can take **possession of and sell the property covered** by said mortgage.

This action is based upon Section 1603, Wilson's Rev. & Ann. St. Okla. 1903, which provides as follows:

"If any person before the granting of letters testamentary or of administration, embezzles or alienates any of the moneys, goods, chattels or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate, for double the value of the property so embezzled or alienated, to be recovered for the benefit of the estate. * * * **Hence the right to the possession of personal property between the time of the death of the intestate and the**

granting of letters of administration is by operation of law suspended and held in abeyance. In 11 Am. & Eng. Encyc. of law, (2d Ed.) p. 985, the rule is thus stated: 'The title of an administrator, on the other hand, is derived solely from the Court by which his letters are granted, and therefore his title to the decedent's estate does not vest until the letters are granted.' And on the following page, in a note, this doctrine is announced: 'Between the death of the intestate and the granting of letters, the legal title to personal property of the intestate is suspended and vested in no one.' See authorities there cited.

In the case at bar the mortgagee proceeded to take possession of the property covered by the chattel mortgage the day following the death of the mortgagor, who died intestate on the 14th day of May, 1895, and on the 17th day of May the mortgagee proceeded to advertise the property for sale, and sold the property on the 28th day of May, 1895, before a special or general administrator had been appointed, and before any application for appointment had been made. But, since the property of a decedent passed the moment of his death to the heirs, subject to the control of the Probate Court, the right of the mortgagee to foreclose and sell the property was suspended and held in abeyance until a special or general administrator was appointed by the Probate Court and any attempt to sell or alienate the property during that period was a wrongful intermeddling with the property of the intestate * * * *

A mortgagee, if he has reasonable grounds to apprehend, and in good faith believes, that the security is about to be lost or materially impaired, has a right to take possession of the property for the purpose of preserving it, but has no right to sell or alienate the same until a special or general administrator has been appointed, whose duty it is to protect the interests and rights of the estate. We think the manifest purpose of the act of the Legislature, which provides that if any person, before the granting of letters testamentary or of administration, alienates any of the moneys, goods, chattels, or effects of a decedent, he is chargeable therewith, and liable to an action by the executor or administrator of the estate for double the value of the property so alienated, was to prohibit the doing of just such acts as are alleged to have been committed in this action. In other words, from the agreed statement of facts in this case, we think the defendant comes clearly within the letter and spirit of said act." (Emphasis ours.)

and in

Altman Taylor Mach. Co. v. Fuss,
86 Okla. 168,
207 Pac. 308;

and in

Secrest v. Wood,
98 Okla. 60,
224 Pac. 549,

the statute is construed and the holdings are directly in point here.

The Oklahoma decisions are particularly called to the attention of the Court, because Oklahoma, like Montana, **adopted her statute from California,** and after the California Court had construed it. Moreover, both the California and Oklahoma decisions constitute the only rational interpretation of the statute.

As early as 1866, California had incorporated this provision into her statute law, for it is found as Section 116, and we quote it because the California statute was amended not in meaning, but in phrasing, in the year 1901, and the original enactment as it existed at the time of Jahns v. Nolting, and as adopted by Montana and Oklahoma, reads as follows:

> "If any person, before the granting of letters testamentary or of administration, shall embezzle or alienate any of the moneys, goods, chattels, or effects of any deceased person, he shall be liable to the action of the executor or administrator for double the value of the property so embezzled or alienated."

The lower Court, of course, took judicial notice of the fact that the Montana Code containing this provision was adopted in 1895 from California. That is the source of Montana Code Law. When Section 10140 was adopted from California, **it had received construction by the California Court.**

In

Jahns v. Nolting
29 Cal. 508,

the Court said:

"To embezzle, as the term is employed in Section one hundred and sixteen, is to fraudulently appropriate to one's own use or conceal the effects of the estate which such person has in his possession; **and to alienate, signifies to wrongfully transfer such property to another**. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law. **An action of the nature of an action of trover may be brought by the administrator, without the aid of section one hundred and sixteen,** against any person who has embezzled or **alienated** the personal property of the estate, **prior to the grant of administration;** * * *" (Emphasis ours.)

Quoting this from the California Court, the Oklahoma Court, in the Altman case, says:

"The above case has been followed and cited by Courts of different States in several opinions, and correctly defines the term, alienation, and we know of no case holding to the contrary." (Emphasis ours.)

This Court is familiar with the rule that a construed statute adopted from another state carries the previous construction thereof by the Court from whence adopted. In the State Courts, this rule of presumption is strongly persuasive. **In the Federal Courts in the absence of a different construction by the State adopting the statute, the rule is clearly recognized; and always applied.**

American Surety Company of New York
v. Cove Irr. Company,
54 Fed. (2d), 197.

One of the latest expressions of the Montana Court on this subject is

Coburn v. Coburn,
89 Mont. 386,
298 Pac. 349,

and the Court says:

"In applying this statute this Court has held, and we think correctly, that our statute was adopted from the State of California, and that with it we adopted the construction given it by that State."

This rule has been expressed on numerous occasions by the Montana Court, the latest of which, so far as our research goes, is

H. Earl Clack Co. v. Stanton,
105 Mont. 375,
72 P. 2d, 1022.

It likewise is the recognized rule of the United States Supreme Court:

U. S. v. Anderson,
52 S. C. 125,
284 U. S. 584,
76 L.Ed. 505.

The case of

Jahns v. Nolting,
29 Cal. 507,

is the key case for this reason: It does decide

definitely that the defense to a criminal act, viz: Good faith and want of criminal intent applies only to a charge of **embezzlement, and not to a charge of tortious alienation.**

In discussing the rule here invoked,

Bancroft's Probate Practice,
Vol. II, Sec. 484, page 890,

says:

> "There is some justification for a statute making one who embezzles or alienates property of a decedent before the grant of administration upon the latter's estate 'liable' to an action for double the value of property. Before administration is had, there is grave danger that an estate may be scattered and dissipated beyond trace by the designing efforts of persons who quietly appropriate goods and effects in the hope that their preying upon the dead will not be discovered. An inhibitory penalty to discourage such practices thus finds some warrant."

The modern cases giving construction to this act are confined to Oregon, Wyoming, Wisconsin and Oklahoma. As we have seen, Oklahoma, having adopted the same statute from California with its construction, as did Montana, is clearly correct, both on principle and by virtue of binding precedent.

The Oregon case of

Springer v. Jenkins,
47 Ore. 502,
84 Pac. 479,

relied upon by appellant, was reversed because

of an excessive award, partly **because the Plaintiff did not plead the statute,** giving double damages as was done here, and without pleading the statute it could not recover multiple damages, (See par. III of the Amended Complaint, R. 74), and which pleading is necessary **where one seeks to recover multiple damages.**

The Springer case is remarkable in illustration of judicial legislation. Moreover, all that is said on the subject of good faith is obiter dicta. It has been materially weakened, however, by the Oregon Court, particularly in

> Swank v. Elwert, 55 Ore. 487,
> 105 Pac. 901.

Springer v. Jenkins has already been repudiated with respect to some of its holdings as we have seen, and it can safely be predicted that it will be entirely repudiated when the court comes to reconsider the point of the status of double damages.

The Oregon court in another case, Gabel v. Armstrong, 88 Ore. 84, 171 Pac. 190, speaking of Springer v. Jenkins, 47 Ore. 502, 84 Pac. 479, said:

> "The authority of these cases is greatly impaired by the latter decision of Swank v. Elwert, 55 Or. 487, 502, 503; 105 Pac. 901, which overruled Springer v. Jenkins."

In the teeth of Oregon's doubt as to the soundness of the Springer case, should we consider it as having any weight?

The Wyoming Court, in Delfelder v. Poston, 42 Wyo. 176, 293 Pac. 354, 361, held that the property was not "alienated," when purchased

by the mortgagee. This case is to be distinguished from the case at bar and the Oklahoma cases except the case of Nichols-Shepard v. Dunnington, 118 Okla. 213, 247 Pac. 353, in that the property **was then purchased by the mortgagee, and on negotiations approved by the mortgagor before his death,** and for a price commensurate with the value of the property, which was not an alienation.

Merill v. Comstock, 154 Wis. 434, 143 N. W. 313, disappears as an authority in support of appellant's position, when we consider that the Wisconsin statute (Sec. 3824), reading like that of Montana, **was qualified by a companion statute (3259 Wisc. Stats.),** the decision, quoting that statute, reading:

> "No person shall be liable to an action as executor of his own wrong for having received, taken or interfered with the property of a deceased person; but shall be responsible as a wrongdoer in a proper action to the executors or general or special administrator of such deceased person **for the value of any property or effects so received or taken** and for all damages caused by his acts to the estate of the deceased. This section came in as part of a scheme for the distribution by the admininistrator of the assets of the estate pro rata among all the creditors of the decedent of equal rank where such assets were insufficient to pay in full. It was therefore necessary to make some change with reference to the law relating to executors de son tort. That particular form of action was abolished, and the person who took or inter-

fered with the property of the deceased person was made responsible as a wrongdoer, not to the creditors or legatees, but to the executors or general or special administrators of the deceased person." (Emphasis ours.)

The cause turned on this latter statute. So the authority of the Wisconsin case as supporting appellant disappears. On the other hand, since it was necessary to apply the applicable statutes above quoted, in order to work out the ruling of non-liability for double damages, one wonders if the court would not have perforce reached exactly the view of the Oklahoma, California and other courts if considering only the statute here in question.

Bachelder v. Tenney, 27 Vt. 578, has not the remotest bearing upon the case at bar. In no sense does it support the Springer case nor Defelder v. Poston, 42 Wyo. 176, 293 Pac. 354.

That case was brought for multiple damages for alleged embezzlement of property of the estate. The defense was that of ownership through joint tenancy with decedent.

The court said:

"There was no secrecy in taking the property, and no concealment of it by the defendant, and no claim made to it, **but as a tenant in common.** * * * All, which the defendant did was done under a claim of right, and the evidence in fact shows that his claim of right, **as tenant in common,** was well founded, and as such, he did not deny his liability to account to the estate of Cilley." (Emphasis ours.)

See 62 C. J. 408, Sec. 2.

In Roys v. Roys, 13 Vt. 543, the construction of the statute apparently turned upon a clause not found in the Montana, California or Oklahoma statutes. At any rate, apparently the court considered the statute had but a single purpose and that was to do away with the right of creditors to sue, and that it merely extended the common law right of an administrator to sue to the extent of giving double damages. That the common law right still existed, and there was retained the defense that if the person who alienated did so under color of right, supposing he had good title, he had a defense.

In Jackson v. Lamar, 67 Wash. 385, 121 Pac. 857, we find a set of facts involving embezzlement. The last sentence of the opinion declares that. If the case at bar involved **embezzlement,** we would agree the case is an authority here. If this were an embezzlement case, there would have to be wrongful intent established, and perhaps more.

See 20 C. J. 407, Sec. 1.

It hardly seems necessary to comment upon

McDonald v. Montana Wood Company,
14 Mont. 88,
35 Pac. 668.

The case carries its own differentiation. The Court said:

"The respondents contend that it was not necessary, under said section, to allege or prove malice, wantonness, or evil design, etc. In Endlich on the Interpretation of Stat-

utes, (section 129), the author, commenting on similar statutes, says: 'Similarly, statutes giving punitive, double or treble damages against one cutting and converting to his own use timber growing on the land of another, without the latter's consent, **are held confined to cases where some element of willfulness, wantonness, carelessness, or evil design enters into the act.** * * * **The evidence in the case does not support the contention that there was any willfulness, wantonness, or maliciousness in the acts or conduct of the defendant.** We therefore think that the evidence did not justify the rendering of judgment for treble damages against defendant in this case." (Emphasis ours.)

When we consider that the holding of the court was persuaded by failure of proof to meet the allegation of the complaint that the act was done maliciously and wantonly, the case disappears as an authority. Otherwise it would be out of line with the general trend of modern authorities.

See 63 C. J. 1071, Sec. 287.

A complete answer to all arguments as to the rule is found in

Sauls v. Whitman,
171 Okla. 113,
42 Pac. (2d) 275.

The Court said:

"Many of the decisions from other jurisdictions, being based on virtually identical circumstances, result in conclusions which can

neither be harmonized with each other nor distinguished by the fact situations. This is probably caused by lending a keen ear to human sympathy in the individual case, meanwhile closing the other ear to public policy and shutting both eyes to the settled law. Just so long as the rules are attempted to be varied to fit the case, or the facts looked at through differently colored glasses in order to reach the desired result, there will be no dependable rule; no settled fixed principle upon which to proceed." (Emphasis ours.)

Again the Court said:

"The next question for consideration is whether the defendants are doubly liable under Section 1219, O. S. 1931, set forth above. The section deals with embezzlement or alienation in instances of this kind. No embezzlement being charged, this is an action involving alienation. This Court in Aultman & Taylor Machinery Co. v. Fuss, 86 Okla. 168, 207 P. 308, 309, and in Nichols & Shepard Co. v. Dunnington, 118 Okla. 231, 247 Pac. 353, in defining what is meant by the word 'alienation,' adopted the definition of the Supreme Court of California as expressed in Jahns v. Nolting, 29 Cal. 507, as follows: 'To alienate, signifies to wrongfully transfer such property to another. Such embezzlement or alienation is a wrongful conversion of the property, for which an action of trover was maintainable at common law,' which definition of itself thereby signifies that the word 'wrongful' means wrongful on account of its being

in violation of the statute and in violation of the common law, **rather than as signifying a wrongful state of mind. In other words, whether such an alienation is 'wrongful' depends not so much on the state of mind as upon the acts done."** (Emphasis ours.)

The Court then reviewed Exchange Bank of Alva, 15 Okla. 564, 83 Pac. 790, and said:

> "It being admitted that the **mortgagee bank acted in good faith,** the trial court found the issues in favor of the defendant. This court, reversing the judgment, said: **"But this fact would not warrant the mortgagee in advertising and selling the property before a special or general administrator was appointed.** * * * We think the manifest purpose of the act of the Legislature * * * was to prohibit the doing of just such acts as are alleged to have been committed in this action. In other words, from the agreed statement of facts in this case, we think the defendant comes clearly within the letter and spirit of said act." (Emphasis ours.)

A review was then made of Hodgson v. Hetfield, 112 Okla. 134, 240 Pac. 69, saying that where money was turned over on advice of an attorney, it was no excuse, and said:

> "Subsequently, the administrator of Pollock's estate recovered double damages against the Sheriff and the verdict was upheld regardless of the good faith of the Defendant."

The Court also in considering alienation

held that because the word "alienate" means to transfer to another, said:

> "The mortgagee of personal property of a deceased person foreclosed against it just as in Litz v. Exchange Bank of Alva, supra, but, instead of selling the property to a third party, **as in the Litz case, bid the property in itself and applied it on the mortgage debt. That is the distinction between the cases.** The Nichols case is not based on absence of wrongful alienation, but on the fact that there was no alienation at all. We do not know what conclusion was reached by the trial court concerning the defendants state of mind; but if affirmance of the judgment should require a finding that it was 'wrongful,' the evidence herein including the reasonable inference to be drawn therefrom, would be sufficient to support such finding. It is undisputed that the defendants in taking the actual cash from the bank, keeping it in their homes instead of depositing it in their accounts until after Mrs. Jent's death, and then disregarding all notice to creditors but summarily paying what creditors of hers they knew of, including the $195 to a defendant's wife, and hastening the remainder away to the society, acted with the motive of keeping it out of probate, the very evil against which the statute is aimed. **The statute requires no 'wrongful' intention and none is required, other than the intention to do the thing which the law forbids."**

In Montana and California are optional procedural statutes. (Mont. R. C. 1935, Sec. 10141

& 10142.) In considering those statutes, adopted from California by Montana, we find a late construction of the purpose of the double damage statute in question.

In
Levy v. Superior Court,
105 Cal. 600,
29 L. R. A. 811,
38 Pac. 965,

the court said:

"There is no question that, if petitioner's premises are correct, his conclusion follows necessarily. But his construction of the provisions in question cannot be sustained. These provisions have received a construction at the hands of this court directly at variance with that put upon them by petitioner. Sections 1458-1461 of the Code of Civil Procedure were, prior to the adoption of the Codes, a part of the old probate act, as sections 116-119 they are a part of the same article, and relate to the same subject, which is expressed in the title as 'Embezzlement and surrender of property of the estate.' In the case of Jahns v. Nolting, 29 Cal. 507, the court had occasion to construe section 116 of the probate act (now section 1458, Code Civ. Proc.) upon the very feature now involved. * * * And it was held that the section was not penal, but purely remedial. Sections 1459, 1460, are strictly within the principles of construction announced in that case. They are no more penal in their essential features than is section 1458. It is true that, as urged by pe-

titioner, they provide for pains and penalties, in the way of imprisonment and damages, under certain contingencies; but the essential distinction between these provisions and a penal statute is that the penalty is not imposed as a punishment for a public wrong, but as redress for a private grievance. And it is not unusual to find provisions of a similar character in statutes purely remedial. Both before and since Jahns v. Nolting these sections have several times been under consideration by the court. In Beckman v. McKay, 14 Cal. 250, the court considered the action, which was brought under Section 116 of the probate act, as in the nature of an action of trover and conversion; and in Mesner v. Jenkins, 61 Cal. 151, it is said 'that under a statute very similar, if not precisely like sections 1458-1461, Code Civ. Proc., the power of a judge of probate, in respect of matters of this kind, is analogous in its extent and object of the power exercised by courts of chancery upon bills of discovery.' "

III.

THE DOCTRINE OF NOSCITUR A SOCIIS DOES NOT APPLY

The use of the word "alienate" in the statute in disjunctive with the word embezzle, only accentuates legislative intent that here should be double damages, regardless of good or bad faith. If one embezzles property, he is civilly liable the same as one who alienates the property. The embezzler gets his greater punishment through the criminal prosecution which

is not in anywise affected by the fact that he is also civilly liable. For the civil liability he stands on the same footing exactly as the one who alienates.

A little thought on this subject would, we submit, have caused learned counsel to omit any reference to

State v. Moran,
24 Mont. 433,
63 Pac. 390,

as an authority having any bearing here. The application of the doctrine there is foreign to any application here.

Here the statute reads "Embezzles or alienates."

The maxim **Noscitur a Sociis** does not apply where **a disjunctive** is used. It applies only where **a conjunctive** is used. Thus in 59 C. J. 979, Sec. 579, the rule is stated:

> "In accordance with the maxim, **noscitur a sociis,** which, however, is merely a guide to the legislative intent and not a fixed rule of construction, the meaning of a word used in a statute must be construed in connection with the words with which it is associated. **Where several words are connected by a copulative conjunction, they are presumed to be of the same class, unless a contrary intention appears. The use of the disjunctive militates against the application of the maxim.** The rule of noscitur a sociis is not invariable, as a word may have a character of its own, not submerged by association. The maxim cannot be invoked where the language is plain." (Emphasis ours.)

How the conduct of appellant can be said to be inconsistent with the imposition of double damages no one but appellant can see.

The conduct was not consistent with good faith and fair dealing. Douglas had scarcely been laid away when appellant moved in to take possession and sell. That appellant wished to do just what it did is apparent. In the conversation and in the telegrams which passed, appellant wished to carry the impression that if the heir took over she must personally assume the debt.

Max Worthington, the son-in-law of decedent, in a conference in January, 1935 (R. 175), was asked by appellant to assume the indebtedness as a condition precedent to being permitted to take and handle the sheep (R. 184-187). Max Worthington, and not Dorothy Worthington, wired on January 23, 1935: "Not interested in handling Simon Douglas property if no other recourse than to take over all obligations." (R. 180.)

There was ample food on hand to carry the sheep through the winter. The appellant knew, or could have found out from any responsible lawyer that it had the right to take possession of the sheep and care for them until an administrator was appointed. It knew that it could apply for and have an administrator appointed without notice. (Sec. 10107-10108 Mont. R. C. 1935.) It knew that it was unlawful—forbidden by law—to sell ad interim death and appointment of such administrator. It knew that winter months in Montana were not propitious for such sales. It knew that the sheep had in poten-

tial wool on their backs, and lambs, **a ventre sa mere** more in value than the mortgage on them.

At the place of sale, before the sale commenced there appeared an attorney and a banker, who called attention to the fact that the proceeding before the appointment of an administrator was illegal. (R. 218-219.)

The banker served a written protest. (R. 218.)

In Bouvier's Law Dictionary, Vol. 2, 1359, "good faith" is defined as follows:

> "An honest intention to abstain from taking any unconscientious advantage of another, even through the forms of technicalities of law, **together with an absence of all information or belief of facts which would render the transaction unconscientious.** Wood v. Conrad, 2 S. D. 334, 50 N. W. 95. See Winters v. Haines, 84 Ill. 588; Rawson v. Fox, 65 Ill. 200; Thornton v. Bledsoe, 46 Ala. 73; Bronner v. Loomis, 17 Hun. (N. Y.) 442. That honesty of intention and freedom from knowledge, of circumstances which ought to put him on inquiry, which protects a purchaser holder, or creditor from being implicated in an effort by one with whom he is dealing to defraud some party in interest. Canal Bank v. Hudson, 111 U. S. 80, 4 Sup. Ct. 303, 28 L.Ed. 354." (Emphasis ours.)

See also 28 C. J. 715, Sec. 9.

In

Yale Oil Corporation v. Sedlacek,
99 Mont. 411, 43 Pac. (2d) 887,

it is said:

"Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it."

An heir-at-law is not the only person interested in an estate of a decedent. The creditors have also an interest therein. The heir's interest is only in the property which will remain after the payment of the debts and expenses of administration.

Sec. 7073, R. C. Mont. 1935.

The answer of the defendant does not show good faith. While it is true that the authorities upon which appellee relies does not permit such as a valid defense, yet, nevertheless, the defendant alleges nothing of interest in that direction because as a creditor it had the right upon application, to have an administrator appointed, either general or special, and it also had the right to take possession of the property and preserve it pending the appointment of an administrator. It was not necessary, nor is there any showing of necessity of a sale of the property a that particular moment.

Douglas owed at the time, in addition to the amount due Regional, at least $16,000.00. (R. 243.) These creditors, as well as the heirs, had an interest in the estate. An heir's interest is only in the net of an estate, after creditors have been paid.

There was ample evidence to support the

court's finding that the value of the property was $17.000.00.

If any quarrel can be made of the court's finding of value, it should come from appellee. The court could have found the value much greater and have been sustained by the evidence.

To start with, appellant offered without restricting the offer, Exhibit "9" (R. 243) a sheet showing the valuation placed by Douglas on the sheep alone, to be $20,110.00, hay worth $2650.00, horses worth $1125.00, alone, amounting to $23,885.00.

When defendants introduced Exhibit "9," it was introduced without reservation, and is competent evidence of values, character and condition, as well as numbers. If plaintiff had offered the exhibit, it might have been objected to as self-serving; but when defendant offered it, it had the same validity as evidence, as though plaintitff had offered it and it had been received without objection.

In 22 C. J. 231, Sec. 207, it is said:

> "Where self-serving declarations are admitted without objection, the evidence cannot afterward be objected to as incompetent."

The estimated wool clip from these sheep was separately valued at $10,500.00 (R. 244). This would have been clipped in four months. As the court knows, sheep men do in this respect "count chickens before they are hatched," as experience shows they may safely do with reasonably certain limitations. He also separately values the estimated lamb crop at

$7,000.00. These lambs would have been produced in about two months. The estimated wool and lamb crop were in excess of the amount of the mortgage debt at the time of foreclosure.

What does appellant do with its own witness? Robinson's testimony, (R.239-266). Robinson said (R. 259):

"Q. All right, now you men had passed judgment just a few days before the sale or a short time before the sale, and you, as Mr. Douglas' manager, were familiar with those sheep on the price of $18,500.00, were you not?
A. Not just the sheep, it was on the entire equipment.
Q. All right, let's put the whole business in at $18,500.00. Were the horses in there?
A. I don't think so.
Q. The horses, at least, were out of the deal?
A. So far as I remember, they were."

There can be no doubt that W. E. Robinson's testimony, while intended to benefit defendant, throws all its weight in favor of plaintiff. When his attention was directed to his idea of valuation of the animals five years before, at the time of the sale, he was visibly embarrassed. This only illustrates the often commented upon rule in weighing evidence concerning the recollection of a witness. The philosophy of the rule is well set forth in

23 C. J. 27, Sec. 1764,

as follows:

"Other things being equal, memory of an event is clear and strong in proportion to its

recency. Hence, in weighing testimony, allowance is constantly made for actual or presumptive want of recollection of facts occurring at a very remote date, and greater credit may be given to the sworn or unsworn statements of a person when made near to the time of the fact under investigation than to his contrary testimony at a much later time. An impression is remembered the better in proportion as it is more attended to, * * *"

It is difficult to understand appellant's discussion of the law of evidence with regard to value. If appellant means that the witnesses must under a statute such as we have here, testify to market value, then of course, we take immediate and vigorous issue.

The statute says there shall be a liability "for double the value of the property." It is silent as to how that shall be measured. It is measured by evidence of market value—it is measured by any evidence of value. It is measured by the evidence that was adduced under whatever heading it might scientifically fall,—by all the evidence adduced in the case. It is conceived that the Legislature did not care to confine one to market value. Market value is rather a fluctuating value. The wrongdoer chooses his own time for the commission of a tort. He might, if the Legislature had confined the measure to market value, choose a time when that value was low.

Value, in law, is sometimes qualified by the word "market." The distinction is pointed out in

66 C. J. 418,

where in discussing the sense in which it is used in our statute, it is said:

> "The primary meaning of 'value' is worth. In general, 'value' has two different meanings; it sometimes expresses the utility of an object and sometimes the power of purchasing other goods with it; the one may be called 'value in use,' the other 'value in exchange.' In the first sense 'value' has been defined as the utility of an object in satisfying, directly or indirectly, the needs or desires of human beings; as applied to property, an attribute which the property possesses by reason of the use which is or may be made of it; of the product that it produces, or may produce; or of some sentimental association connected with it; thus property may have value, notwithstanding there is no market for it."

In this larger sense, none of the evidence introduced by defendant is relevant to the issue in the case under the statute. Value here should be measured by the standard of plaintiff's evidence. The plaintiff is not bound by evidence of what at the given moment of tortious taking it may have on the market. That may be a proper measure of damages in those commodities kept exclusively for purchase and sale, as distinguished from commodities kept for production purposes, such as a band of sheep, a herd of cattle, or the like.

The tortious sale broke up this band of sheep and scattered them in many directions. It was impossible to trace through to determine the increment of value at the time of the tort potentially in existence and partially matured;

namely the lamb crop and the wool crop, which would in the course of events and in a very short while have become tangible. It was the value, in its broader sense, intended by the statute. The quantum and quality of evidence introduced by plaintiff is overwhelming in this respect.

It can be said with accuracy that defendant produced no evidence materially affecting the issue. The three points in the evidence avail of this rule, Hall Clement's evidence, the mute evidence of Douglas himself, and Robinson's view at the time just preceding the sale.

Sec. 8689 R. C. Mont. 1935, Value & Market Value;

Klind v. Valley County Bank, 69 Mont. 386, 222 Pac. 439.

IV.

COUNSEL CONTEND THAT IF THE PROPERTY SOLD FOR LESS THAN ITS FULL VALUE, THE DAMAGE IS ONLY THE DIFFERENCE BETWEEN THE SALE PRICE AND VALUE. THIS LOSES SIGHT ENTIRELY OF THE STATUTE. (Sec. 10140.) THIS STATUTE DOES NOT MENTION "DAMAGES." IT SAYS THE ALIENATOR IS LIABLE TO AN ACTION * * * FOR DOUBLE THE VALUE OF THE PROPERTY SO ALIENATED.

With the construction of this statute comes the rule of recovery.

In Jahns v. Nolting, 29 Cal. 507-511, it is said:

"And that section does not give a new right of action, nor create a remedy where one did not previously exist, but it merely increases the damages, in case the tortious conversion has been committed at a particular time, * * * that is, the time intermediate the death * * * and the issuing of letters."

This is not only the law of Montana by adoption of construction with the statute, but it is the law tested by all the decisions.

Sec. 8689 R. C. Mont. 1935, fixes the measure of damage as follows:

"The detriment caused by the wrongful conversion of personal property is presumed to be:

1. The **value** of the property at the time of its conversion, with the interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest **market value** of the property at any time between the conversion and the verdict, without interest, at the option of the injured party. (Emphasis ours.)

This section contains both expressions: "value" and "Market value."

The Montana court has often distinguished the two.

Thornton Thomas Co. v. Bretherton, 32 Mont. 80, 80 Pac. 10; Doll v. Hennessy Merc. Co., 33 Mont. 80, 81 Pac. 625; Klind v. Valley County Bank, 69 Mont. 386, 222 Pac. 439; In Durocher v. Myers, 84 Mont. 225, 274 Pac. 1062, it is said:

"The measure of damages is 'the value of

the property at the time of its conversion' (Sec. 8689, R. C. 1921), which usually means the market value, (James v. Spear, 69 Mont. 100, 220 Pac. 535); but property may have a value notwithstanding there is no market for it, and it will not do to say that, because not bought and sold in the market, valuable property may be taken or destroyed and the owner receive nothing therefor, (Union Pacific Ry. Co. v. Williams, 3 Colo. App. 526, 34 Pac. 731)."

When witnesses testified as to "value" they would be understood as meaning value measured in any way. But the witnesses for appellee were duly qualified in a very formal manner to speak on the subject.

(See witness Yeager, R. 125)
(See witness King, R. 143-147)

Now counsel inject the **de son tort** rule and insist upon its being exemplified by Merrill v. Comstock, 154 Wis. 434, 143 N. W. 313. That case expressed an old common law rule, and we have heretofore fully discussed the case.

Here, however, we need not be in doubt for the established rule is stated in Aultman & Taylor v. Fuss, 86 Okla. 168, 207 Pac. 308, as follows:

"It is next contended that the court erred in instructing the jury as to the amount of recovery if the plaintiff should recover. The plaintiff in error contends that the court should have advised the jury the amount of recovery would be the value of the property, less the amount of the lien upon said prop-

erty, and then double that amount, and, if the lien was more than the value of the property, the plaintiff could not recover. The statute is plain and unambiguous, and makes no reference to a lien, and the contention is contrary to the holding in the case of Litz v. Exchange Bank of Alva, 15 Okla. 564, 83 Pac. 790. The instruction of the court followed the statute, and was not erroneous."

V.

REGARDLESS OF THE FACT THAT APPELLANT IS A GOVERNMENT OWNED CORPORATION, IT IS LIABLE EXACTLY LIKE ANY OTHER PRIVATE CORPORATION.

Ever since it became common practice to employ government owned corporations, for furthering administration policies, counsel for these government owned corporations have been fighting a losing battle in their endeavor to maintain (1) that such corporations were in fact the United States and were not suable, Keifer & Keifer v. R. F. C. 306 U. S. 381, 83 L. Ed. 784; (2) liable for costs, Reconstruction Finance Corporation v. J. A. Menihan Corp., 312 U. S. 81, 85 L. Ed. 595; (3) liable for attorney fees, Davis v. Perrington, 281 Fed. 10; (4) liable for damages, Melon v. World Pub. Co., 20 Fed. (2d) 613; (5) liable for special equitable imposition, R. F. C. v. J. A. Menihan Corp., 312 U. S. 81, 85 L. Ed. 595; (6) liable in tort, Keifer & Keifer v. R. F. C., 306 U. S. 381, 83 L. Ed. 784. **It is not surprising, therefore, that we find** gov-

ernment counsel again mustering every resource to defeat multiple damages.

Their difficulty in all these contentions was their failure to differentiate between **sovereignty and sovereign acts** and those of instrumentalities and agencies—government owned corporations, set up by the government.

Of course, it is fundamental that the sovereign cannot be sued without its consent. It may enforce any condition it desires to impose, if it does assent to suit.

65 C. J. 1409, Sec. 184.

With this statement we launch at once into an analysis of Missouri Pacific Ry. v. Ault, 256 U. S. 554, 65 L. Ed. 1087, 41 S. Ct. 593. That case **involved** the full **sovereignty** of the United States. In conducting World War No. 1, it was found important for the **sovereign, acting not through the agency of any private corporation,** not even through the Railroad corporations themselves, but through direct action of the executives, nominally one of the secretaries, actually by the President himself, to manage and control the railroads. Whether this action could have been taken without congressional authority, under the broad powers of the President, we need not now stop to inquire. Both the Congress and the Executive did act, and their action was valid.

The case arose over a penalty statute of Arkansas. To quote

> "A statute of Arkansas provides that whenever a railroad company, or a receiver operating a railroad, shall discharge an em-

ployee, with or without cause, it shall pay him his full wages within seven days thereafter, and that if payment is not duly made, 'then as a penalty for such nonpayment, the wages of such servant or employee shall continue from the date of the discharge or refusal to further employ, at the same rate until paid.' Kirby's Digest, 6649 as amended by Act of 1905, No. 210."

The court reasoned:

"The company is clearly not answerable in the present action if the ordinary principles of common-law liability are to be applied. The Railroad Administration established by the President in December, 1917, did not exercise its control through supervision of the owner-companies, but by means of a Director General, through 'one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace, for the period provided, the private ownership theretofore existing.' Northern Pac. R. Co. v. North Dak., 250 U. S. 135, 148, 63 L. Ed. 897, 902; P. U. R. 1919 D, 705; 39 Sup. Ct. Rep. 502."

In the course of the opinion, the court said:

"The contention that the Director General, being the carrier, is liable for the penalty imposed by the Arkansas statute, is rested specifically upon the clause in Sec. 10, to the effect that the carriers 'shall be subject to all laws and liabilities as common carriers, whether arising under state or Federal laws

or at common law,' and the provision in Sec. 15, that the 'lawful police regulations of the several states' shall continue unimpaired. By these provisions the United States submitted itself to the various laws, state and Federal, which prescribed how the duty of a common carrier by railroad should be performed, and what should be the remedy for failure to perform. By these laws, the validity and extent of claims against the United States, arising out of the operation of the railroad, were to be determined. But there is nothing either in the purpose or the letter of these clauses to indicate that Congress intended to authorize suit against the government for a penalty, if it should fail to perform the legal obligations imposed."

The government, acting under its sovereign authority, through the Executive himself, limited its liability. The court held:

> "The purpose for which the government permitted itself to be sued was compensation, not punishment. In issuing General Order No. 50, the Director General was careful to confine the order to the limits set by the act, by concluding the first paragraph of the order: 'Provided, however, that this order shall not apply to actions, suits, or proceedings for the recovery of fines, penalties and forfeitures.' Wherever the law permitted compensatory damages, they may be collected against the carrier while under Federal control. Such damages may reasonably include interest and costs. See Hines v. Tay-

lor, —— Fla., —— 84 So. 381. But double damages, penalties, and forfeitures, which do not merely compensate but punish, are not within the purview of the statute."

There we have it plainly stated. The sovereignty, while it consented to be sued, still validly limited its liability by General Order No. 50. What a different story is presented when we come to government owned corporations. These corporations were set up just like other corporations.

From the earliest day of an instance of the exercise of constitutional power through government corporations, the courts have held them not immune from suit. One of the earliest cases bearing upon this subject is

Bank of Kentucky v. Wister, 2 Pet. 318, 7 L. Ed. 437,

handed down in 1829. In

Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 83 L. Ed. 784,

involving directly a Regional Agricultural Credit Corporation, it was contended, as here, that the Regional was immune to suit. The Ault case was handed down in 1921; the Keifer case in 1939. The Ault case was cited by counsel in their briefs in the Keifer case to the Supreme Court among other cases; but the legal "climate," so far as the attitude of courts towards such agencies is concerned, had materially changed in the eighteen years. In the course of the opinion, speaking of the general practice

to include legislation providing for such corporations the authoritoy to sue and be sued, the court said:

> "Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitble scope."

Again, in the Keifer case, the court said:

> **"Therefore, the government does not become the conduit of the immunity in suits against its agents or instrumentalities merely because they do its work.** United States v. Lee, 106 U. S. 196, 213, 221; 27 L. E. 171, 179, 182; 1 S. Ct. 240; Sloan Shipyards Corp. v. United States Shipping Bd. Emergency Fleet Corp., 258 U. S. 549, 567; 66 L. Ed. 762, 768; 42 S. Ct. 386, 48 Am Bankr. Rep. 249. For more than a hundred years corporations have been used as agencies for doing the work of the government. Congress may create them 'as appropriate means of executing the powers of government, as, for instance, . . . a railroad corporation for the purpose of promoting commerce among the states.' Luxton v. North River Bridge Co., 153 U. S. 525, 529; 38 L. Ed. 808, 810; 14 S. Ct. 891. **But this would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted."** (Emphasis ours.)

One cannot read the decision without appre-

ciating the fact that the Ault case must be narrowly limited.

The learned annotator, who prepared the notes following the Keifer case, sums up the rule of the scores of authority as follows:

> "The purpose for which a governmental corporation is created, or the function which it is designed to fulfill, is generally regarded as of importance in determining whether such corporation is subject to suit. For example, where a state or the United States creates or organizes a corporation and operates the same for a commercial purpose, it is ordinarily held subject to suit the same as any private corporation organized for the same purpose."

Among the many cases holding to liability decided by the United States Supreme Court and Federal Courts, are the following:

Bank of United States v. Planters Bank (1824) 9 Wheat. 904, 6 L. Ed. 244;

Lord & B. Co. v. United States Shipping Bd., (1920, D. C.); 265 F. 955;

Providence Engineering Corp. v. Downey Shipbuilding Corp. (1923, C. C. A. 2d), 294 F. 641;

(Writ of certiorari denied in United States Shipping Bd. Emergency Fleet Corp. v. Chase Nat. Bank (1924), 264 U. S. 586, 68 L. Ed. 862; 44 S. Ct. 334);

Wallace v. U. S. Shipping Bd. Em. Fleet Corp. (1925; D. C.) 5 F. 2d 234.

Standard Oil Co. v. United States, (1928; D. C.) 25 F. 2d 480;

Pennell v. Home Owners Loan Corp., (1937; D. C.) 21 F. Supp. 497;

United States ex rel Skinner & E. Corp. v. McCarl (1927), 275 U. S. 1; 72 L. Ed. 131; 48 S. Ct. 12;

Federal Sugar Ref. Co. v. United States Sugar Equalization Bd. (1920; D. C.), 268 F. 575;

Gould Coupler Co. v. United States Shipping Bd. Emergency Fleet Corp. (1919; D. C.), 261 F. 716.

The State Courts, Kentucky, Nebraska, New Jersey, New York, Ohio, Pennsylvania and Washington, as is fully shown in the annotations to the Keifer case, have all held accordingly.

The last remaining sector in the battle concerning suability of a corporation created by government was that of liability for tort, now eeffctively settled by the decision in the Keifer case. The same holding has been made in

Gillen v. Home Owners Loan Corporation, 8 N. Y. S. 945, (2d), 21 N. E. (2d) 521.

In

Sevin v. Inland Waterways Corp., 88 Fed. (2d) 988,

the court said:

"By Section 5 (b) 49 U. S. C. A. Section 155 (b), the (Inland Waterways) corporation

may sue and be sued in its corporate name. The act does not say how it may be sued. It would be suable as other corporations are sued, notwithstanding its public ownership if there were no law to the contrary."

In

Herman v. Home Owners Loan Corp.,
120 N. J. L. 437,
200 Atl. 742,

the court, after duly considering the matter, said:

"But taken in connection with other features adverted to above, it is persuasive that this corporation was intended by Congress to be accountable for such liability as would attach to a private mortgage loan corporation managing real estate acquired by foreclosure of a mortgage to it."

We come down now to Feb. 1, 1940, when the Supreme Court handed down Federal Housing Administrator v. Burr, 309 U. S. 242, 84 L. Ed. 727, where the high court said:

"Hence, when Congress establishes such an agency, authorizes it to engage in commercial and business transactions with the public, and permits it to "sue and be sued," it cannot be lightly assumed that restrictions on that authority are to be implied. Rather if the general authority to "sue and be sued" is to be delimited by implied exceptions, it must be clearly shown that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied re-

striction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the "sue and be sued" clause in a narrow sense. **In the absence of such showing, it must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue and be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be."**

Still these government owned corporations again advanced what they conceived was the question of their legal status, and again the Supreme Court, in R. F. C. v. J. G. Menihan Corporation, 312 U. S. 81, 85 L. Ed. 595, almost impatiently said:

"These decisions chart our course. The Reconstruction Finance Corporation is expressly authorized to sue and be sued. It has availed itself of that authority to bring the defendants into court to answer the charge of trademark infringement. The defendants have successfully resisted the charge and the question is whether they should be denied the usual incidents of their success. We apply the principle that there is no presumption that the agent is clothed with sovereign immunity. We look as in the Keifer and Burr cases to see whether Congress has endowed petitioner with that immunity and we find no indications whatever of such an intent. **We**

apply the farther principle that the words 'sue and be sued' normally include the natural and appropriate incidents of legal proceedings. The payment of costs by the unsuccessful litigant, awarded by the court in the proper exercise of the authority it possesses in similar cases, is manifestly such an incident. The additional allowance made by courts of equity in accordnace with sound equity practice is likewise such an incident. Sprague v. Ticonic Nat. Bank, 307 U. S. 161, 83 L. Ed. 1184, 59 S. Ct. 777. We perceive no reason for holding that petitioner may avail itself of the judicial process in accordance with the authority conferred upon it and escape the usual incidents of that process in case its assertions of right prove to be unfounded. On the contrary, we think that the unqualified authority to sue and be sued placed petitioner upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances."

See also 65 C. J. 1299, Sec. 79.

Again see 65 C. J. 1302, Secs. 82-83.

But compensatory damages are not "penalty," even where the sovereignty of the United States is concerned, under General Order No. 50, which order is not applicable here.

McDaniel v. Hines, Director General,
292 Mo. 401; 239 S. W. 471;

Page v. Payne, 293 Mo. 600,
240 S. W. 156;

Jahns v. Nolting, 29 Cal. 507.

RESUME

In the foregoing brief we feel we have demonstrated beyond doubt the correctness of the judgment of the court below. It seems clear that the quantum and quality of judicial authority discloses that the proper construction of the statute in question applies it to all cases in line with the case at the bar imposing the double damages for interference with or alienation of chattel property between the date of death and the appointment of an administrator; that neither intent nor good faith constitutes a defense; that the statute was adopted from California with its construction, which is binding. That Muth v. Goddard, applying to real estate, has no application here.

We respectfully submit that the judgment below should be affirmed.

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